IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1674

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CONSUMERS POWER COMPANY, AND THE PENSION PLAN FOR EMPLOYEES OF CONSUMERS POWER COMPANY,

Petitioners,

vs

UTILITY WORKERS UNION OF AMERICA AFL-CIO, AND ITS MICHIGAN STATE UTILITY WORKERS COUNCIL, LEWIS J. TINKLEPAUGH, CLARENCE J. SEGORSKI, LEO LINGRAM, BURNELL CLOUGH, ROBERT YON, RAY ROGERS and PAUL DeHATE,

Respondents.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## COUNTER-STATEMENT OF QUESTION PRESENTED

Does a provision in Petitioners' pension plan, which deducts all or a portion of the vested retirement benefits otherwise payable to a plan participant by the amount he subsequently receives as worker's compensation benefits, violate the vesting and nonforfeitability provisions of Sections 203(a) and 3(19) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 153(a) and 29 USA 1002(19)?

## PARTIES TO THE PROCEEDING

The names of all the parties to this proceeding are contained in the caption of the case.

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## RESPONDENTS' BRIEF IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 637 F.2d 1082 (1981). The opinion of the District Court is reported at 453 F. Supp. 447 (1978).

### COUNTER-STATEMENT OF THE CASE

Because appellants' "Statement of the Case" is inaccurate and unfairly abridged, appellees submit this counter-statement.

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Plaintiffs-Respondents, Utility Workers Union of America, AFL-CIO, and its Michigan State Utility Workers Council

(hereinafter, together, the "Union"), are labor organizations which are the exclusive bargaining agent, with certain exceptions, for the operating, maintenance and construction employees of Defendant-Petitioner, Consumers Power Company (hereinafter the "Company" or "Employer"). Individual Plaintiffs-Respondents, Tinklepaugh, Segorski, Lingram, Clough, Yon, Rogers and DeHate, are retired employees of the Company and are "participants," under §3(7), 29 USC 1002(7), of the Employee Retirement Income Security Act (ERISA), in Defendants-Petitioners' Pension Plan for Employees of Consumers Power Company (hereinafter "Plan" or "Pension Plan"). Each individual plaintiff is eligible to receive retirement benefits under Petitioners' Plan.

The calculation and payment of each Plan participant's retirement benefit ("Retirement Income") is based solely on his years of service and final average compensation. The operative section of the Plan (VII-3), which incorporates the vesting requirements of ERISA §203(a), promises that an employee with ten years of credited service "will receive, commencing at Normal Retirement Date, Retirement Income equal to 100% of his Accrued Retirement Income." This accrued benefit — the "Accrued Retirement Income" — which he is to receive in full after working ten credited years — is defined by the Plan as the amount of retirement income which he has earned under the years of service calculation of another Plan section (V-1):

> "With respect to any employee at any particular date, the Retirement Income beginning at Normal Retirement Date which would be payable to such employee at the rates provided in sub-section 1 of Section V, on the basis of his Accredited Service rendered to the date of the computation, limited, however, by the provisions with respect to transfer in subsection 8 of Section III and by the provision with respect to maximum Retirement Income in subsection 6 of Section V."[1]

[1] Neither of these two enumerated Plan sections — the only limitations on the Plan's calculation of the retirement benefit — includes offsets for worker's compensation.

Finally, Section V-1 of the Plan provides pertinently:

"V-1. Normal or Deferred Retirement Income

The monthly Retirement Income payable to an employee who, at Normal Retirement Date or at Deferred Retirement Date, retires on or after January 1, 1976, pursuant to the provisions of the Plan from the service of the Company, will be an amount equal to the product of the employee's Final Pay times the sum of the percentages determined as follows:

1½% for each of the first 20 years of Accredited Service.

1% for each of the next 10 years of Accredited Service.

½% for each of the next 10 years of Accredited Service . . ."

Even though the foregoing provisions describe the entire benefit calculation and payment formula under the plan, an entirely separate Plan section (V-2) provides that the participant's benefit calculated under the plan will not be fully paid if he subsequently receives worker's compensation payments from the Company or its insurer:

"V-2. Workmen's Compensation. All Workmen's Compensation weekly payments received by a retired employee from the Company, Michigan Gas Storage Company, Northern Michigan Exploration Company, or anyone else making such payments for one of those companies will be a credit against any Retirement Income or any other payments under this Plan. Monthly payments under the Plan will be reduced by the amount of such credit pursuant to the following rules:

(a) The Credit will be based on Workmen's Compensation paid during the preceding month. If Workmen's Compensation payments are made for the entire month, the credit will equal 4-1/3 weekly Workmen's Compensation payments.

(b) The maximum credit against any Retirement Income or any other payments under this Plan for Workmen's Compensation payments in any month will be the amount of such monthly payments due under this Plan for the succeeding month."

Plaintiffs-Respondents submit, and the appellate and district courts held, that this provision effects a forfeiture of vested rights prohibited by ERISA §203(a).

Because of the challenged worker's compensation offset provision here at issue, individual plaintiffs, all of whom are retired, now or will suffer substantial and total losses of their retirement pensions, contrary to Petitioners' assertions (p. 5).[2]

There is nothing in the Plan which forfeits the retirement benefits of able-bodied employees on account of income from other employment, which retirees are free to earn.

In contrast to its enormous impact on affected workers, the record evidence demonstrates that the effect of the offset on the Company's funding obligations to the Plan is actuarially insignificant.

Although the Pension Plan was unilaterally established by the Company in 1944, the worker's compensation offset provision first appeared in the Plan in 1966. Consequently, during most of their working careers with the Company, the individual plaintiffs accrued pension benefits under the Plan's years of service calculations expecting no possibility of benefit reduction for worker's compensation.

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[2]Plaintiff Paul DeHate retired from the Company with 27 years of service following knee and spinal injuries for which he is receiving worker's disability benefits. He has consequently lost his entire $430 monthly pension.

Plaintiff Robert Yon, who retired from the Company in 1976 after 31 years of ervice, has similarly lost his full monthly pension of well over $300 because he is receiving worker's compensation for a broken leg and hip and knee damage suffered in 1975.

Plaintiff Burnell Clough retired with 25 years' service effective October, 1976. He receives $105.00 weekly in worker's disability benefits for massive injuries from a 46,000-volt electrocution and subsequent long fall, but his accrued vested pension of $226 monthly has been wiped out.

Plaintiff Leo Lingram has similarly forfeited his entire pension because he is receiving $106.40 weekly under worker's compensation.

Finally, Ray Rogers, Clarence Segorski and Lewis Tinklepaugh are currently processing worker's compensation claims at the time of this lawsuit. If "successful," Rogers stands to have his pension forfeited entirely or reduced by approximately $156 per month; Tinklepaugh would lose his entire monthly pension payments.

Contrary to the Petition, the Plan is not "collectively bargained." The Plan covers all regular full-time employees of the Company, including unorganized employees, and not just those bargaining unit members represented by the Union. The 1974-1977 collective bargaining contract between the Union and Company simply acknowleges that the Pension Plan is in effect, but except for determining the duration of the Plan for bargaining unit employees, sets forth none of its terms or conditions, and specifically states that the Plan "is set forth in a printed booklet entitled Pension Plan for Employees of Consumers Power Company, as Amended to and Including Amendment of July 1, 1971 [and] is subject to the terms and conditions set forth therein."[3]

Consistent with the Company's then-continuous insistence that the Plan's terms and conditions were "not made a part of the collective bargaining agreement," the worker's compensation offset was never a subject of negotiations between the Company and Union, nor ever specifically raised or discussed, during the five bargaining rounds from 1966 to the present. Until 1977, the Company-administered Plan, if discussed at all, was simply presented to the Union as a package plan to be renewed.

Following the enactment of ERISA on September 2, 1974, the Company otherwise modified the Plan to comply with ERISA. Contrary to the Petitioners' assertion (Petition p. 4), the Union objected to the offset at a meeting with the Company on April 29, 1976, and specifically asserted that the offset provision violated the vesting and nonforfeitability requirements of ERISA.

Ignoring these objections, the Company then submitted its amended Plan to the Internal Revenue Service for tax qualifica-

[3]Even were the Plan collectively bargained, as asserted by Petitioners, the parties specifically agreed in collective bargaining that any unlawful contract provisions would be unenforceable and severed from the remainder of the contract.

tion. The Union made similar written objection to the offset provision to IRS, which (by its Detroit office) ultimately responded on April 5, 1977, that the offset did not render the Plan "discriminatory" (which the Union had not alleged), but IRS made no determination regarding the alleged violations of the vesting and forfeiture provisions of ERISA. Contrary to the implications of the Petition (p. 4), no hearing was ever held by IRS.

The Union, seeking not to disqualify the Plan, but to enforce the ERISA rights of its members, instituted this action in the Eastern District of Michigan on July 15, 1977. The District Court held, on June 13, 1978, that the Plan offset provision violates ERISA Section 203(a), 29 USC 1053(a).

The Sixth Circuit Court of Appeals affirmed that holding on January 6, 1981.

## REASONS FOR DENYING THE WRIT

### 1.

Petitioners urge that *certiorari* be granted because of the importance of the issue presented. Respondents agree that the issue presented by this case is of paramount importance. While the existence of worker's compensation offsets means little financially to the relatively few pension plans containing them — indeed, the offset is incontrovertably "actuarially insignificant" in the instant case — the injury such offsets inflict upon affected workers is staggering and irreparable, as exemplified by the circumstances of the individual plaintiffs.[4] The only known study of the impact of such offsets, prepared for the Department of Labor, concluded that while the elimination of such offsets would increase annual pension plan contributions only 0.22 to 0.24 *percent* of current pension costs, it would prevent the forfeiture of $225 to $340 monthly retirement benefits by affected participants (estimated at only 2,000 per year nation-

[4]See note 2, *supra*.

wide). Hays Associates, Analysis of Pension Plans/Worker's Compensation Offsets: Final Report, April 13, 1979, Contract No. J-9-P-7-0065, p. iii. The result urged by Petitioners would exacerbate the hardships of workers who have already suffered disabling on-the-job injuries, and who would now forfeit the normal service pensions which they had earned during their working careers and which they were slated to receive as deferred compensation.

This result would violate ERISA. In enacting ERISA §203(a) Congress unambiguously outlawed — with certain irrelevant exceptions specified in §203(a)(3) and elsewhere in ERISA — *all* private pension plan provisions which operate to reduce a portion or all of a participant's retirement benefit after the participant had put in the years of service required for his pension to "vest" and become "nonforfeitable." Congress, further, intended that the "accrued benefit" which would be required to become vested and nonforfeitable would not be meaningless, and provided a statutory definition of the "accrued benefit," ERISA §3(23), as well as certain minimum benefit accrual standards, ERISA §204. And, as the Sixth Circuit noted below, ERISA §3(19) requires that the participant's nonforfeitable claim attach to "that part of an immediate or deferred benefit under a pension plan *which arises from the participant's service.*" 637 F.2d at 1091. Thus, the language, broad purposes and legislative history of ERISA plainly bar the worker's compensation offsets.

While Petitioners seek comfort in the separate anti-discrimination requirements of the tax code — which themselves authorize (for anti-discrimination purposes alone) "integration" of pension benefits with public *retirement* benefits only, IRC §401(a)(5) — Congress clearly intended that the new vesting and anti-forfeiture requirements of ERISA be independent standards which pension plans would thereafter be required separately to meet.

2.

While every outstanding District or Circuit Court opinion on this issue in three different Circuits (the Sixth, Seventh, and Ninth) has invalidated pension plan worker's compensation offsets, Respondents acknowledge that the one contrary outstanding decision, that of the Third Circuit in *Buczynski* v *General Motors Corp*, 616 F.2d 1238 (CA 3,1980), has created a conflict among the Courts of Appeals. Moreover, it is anticipated that this Court will decide *Buczynski* and the companion case, *Alessi* v *Raybestos-Manhattan, Inc*, Docket Nos. 80-193 and 79-1943, respectively, before the end of the current term of the Court. That decision may dispose of the issue in this case.

Accordingly, Respondents suggest that this Court hold the Petition in abeyance until the Court issues its decision in *Buczynski* and *Alessi*. This might obviate the need to process the instant case before the Court — with accompanying expenditure of time, effort and resources — should that decision be dispositive of the present case.

## CONCLUSION

For the foregoing reasons, Respondents request the Court to hold Petitioners' Petition for Writ of Certiorari in abeyance pending issuance of the Court's decision in *Buczynski* and *Alessi*.

Respectfully submitted,

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DATED: April 30, 1981